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Attorney for Defendants CITY AND COUNTY OF SAN FRANCISCO and CITY OF SAN FRANCISCO UPTOWN PARKING CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CRAIG YATES,
Plaintiff,
v.
UNION SQUARE; CITY AND COUNTY OF
SAN FRANCISCO, CITY OF SAN
FRANCISCO UPTOWN PARKING
CORPORATION; EMPORIO RULLI IL
CAFFE UNION SQ.; EMPORIO RULLI IL
CAFFE UNION SQ., INC.; and DOES 1
through 50, Inclusive,
Defendants.

CASE NO. C074087 JSW

**DECLARATION OF MARTIN H. ORLICK,
ESQ. IN SUPPORT OF REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR THE COURT TO DECLINE
SUPPLEMENTAL JURISDICTION OVER
AND TO DISMISS PLAINTIFF'S STATE
LAW CLAIMS [28 U.S.C. § 1367(c)] AND TO
STRIKE PLAINTIFF'S UNSUPPORTED
AND IMPROPER DAMAGE PRAYERS
FROM THE COMPLAINT [FRCP 12(f)]**

Accompanying papers: Reply Memorandum of Points and Authorities

Date: February 8, 2008

Time: 9:00 a.m.

Place: Courtroom 2, 17th Floor

Judge: Hon. Jeffrey S White

Trial Date: None Set
Complaint Filed: August 9, 2007

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1 I Martin H. Orlick declare:

2 1. I am a member of the law firm of Jeffer, Mangels, Butler & Marmaro LLP and am
 3 duly licensed to practice before this Court. I make this Declaration based on personal, first hand
 4 knowledge, and if called to testify as a witness as to any of the matters contained herein, I am
 5 competent to and would do so.

6 2. In an effort to convince the Court that this Motion is untimely, plaintiff's declaration
 7 presents an incomplete, distorted, and self-serving history of the pending Motion to Dismiss and
 8 Motion to Strike (the "Motion") and the discussions between counsel. It is not!

9 3. On two occasions, I spoke with plaintiff's counsel, Timothy Thimesch, Esq.,
 10 concerning this Motion and informed him that defendants considered the state law claims to be
 11 improper for disposition in this Court. Based on the well recognized principle of "comity", I
 12 explained to him in detail that in light of Lentini v California Center for the Arts, 370 F.3d 837 (9th
 13 Cir. 2004) and the state appellate decision, Gunther v. Lin, 144 Cal.App.4th 223(2006), there is a
 14 conflict between the state and federal courts on whether a plaintiff must allege and prove intentional
 15 discrimination to recover \$4,000 per occurrence minimum statutory damages under the Unruh Civil
 16 Rights Act, Civil Code Section 52. I specifically cited plaintiff's counsel to the cases which uphold
 17 the comity principle. I also specifically identified four (4) Orders from the United States District
 18 Court for the Southern District of California in which my clients prevailed on similar motions.

19 4. On two occasions prior to filing the instant Motion, I specifically asked plaintiff's
 20 counsel to stipulate to dismissing the state law damage claims without prejudice and noted that
 21 plaintiff's counsel could refile the state law claims in Superior Court if he so desired. Plaintiff's
 22 counsel refused. Rather, he initially contended that the Motion had no merit and later argued that
 23 the Motion was untimely. Plaintiff's counsel asked why the Motion was not filed earlier. I recited
 24 the history of the Motion.

25 5. I explained that plaintiff's counsel refused to extend a basic courtesy of a two week
 26 extension of time for defendants to respond to the Complaint while Declarant cleared conflicts with
 27 the City and County of San Francisco. As a result, on August 30, 2007, it was necessary for
 28 defendants to file a Motion for Extension of Time to Respond. Defendants filed their original

1 Motion to Dismiss on September 28, 2007, (21) twenty-one days after the Court granted defendants'
 2 Motion for an Extension of Time to Respond to September 28, 2007. The Court issued an Order for
 3 parties to Consent or Decline Jurisdiction of United States Magistrate Judge Elizabeth LaPorte. On
 4 October 8, 2007, defendants challenged the jurisdiction of Magistrate Judge LaPorte to preside over
 5 the action, and on October 10, 2007, an Order reassigning the case to Judge Jeffrey S. White was
 6 issued by the Court. At that time this Court vacated the hearing date for defendants' Motion. I told
 7 plaintiff's counsel that defendants would renote the Motion. On October 18, 2007, defendants
 8 filed a Notice of Related Cases to consolidate the instant case with Kirola vs. The City and County
 9 of San Francisco, USDC Northern District of California Case No. C07-3685, before Judge Saundra
 10 B. Armstrong, an action which seeks injunctive relief to remove access barriers in all public parks
 11 located in the City and County of San Francisco, including Union Square.

12 6. On November 8, 2007, Judge Armstrong issued an Order stating that the cases were
 13 not related and therefore the case was not reassigned to Judge Armstrong.

14 7. On December 4, 2007, Judge White also determined that the cases were not related
 15 and that no reassignment would occur.

16 8. On December 12, 2007, defendants refilled their Motion before Judge Jeffrey S.
 17 White.

18 9. Plaintiff's counsel took the position that the Motion had to be filed at the first
 19 opportunity, (which it was), and insisted that defendants' Motion was untimely.

20 10. Plaintiff's counsel turned a deaf ear and refused to consider defendants' position.
 21 Instead, plaintiff's counsel kept repeating that the Motion was untimely. Plaintiff's counsel for
 22 failed to offer any authority to support his position. This latter conversation was followed by
 23 plaintiff's counsel's self-serving emails accusing Declarant of refusing to meet and confer to avoid
 24 the Motion. Counsel's self-serving emails tell an incomplete and inaccurate version of the events
 25 surrounding this Motion.

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1 I declare under penalty of perjury under the laws of the State of California that the foregoing
2 is true and correct.

3 DATED: January 25, 2008

JEFFER, MANGELS, BUTLER & MARMARO LLP
MARTIN H. ORLICK
MATTHEW S. KENEFICK

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By: /s/Martin H. Orlick

MARTIN H. ORLICK

7 Attorneys for Defendants CITY AND COUNTY OF
8 SAN FRANCISCO and CITY OF SAN FRANCISCO
9 UPTOWN PARKING CORPORATION

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